

BOARD OF APPEALS CASE NO. 4961
APPLICANT: Bell Atlantic Mobile
REQUEST: Special Exception to locate
a communications tower in the AG District;
1714 Morse Road, Forest Hill

BEFORE THE
ZONING HEARING EXAMINER
OF HARFORD COUNTY

Hearing Advertised
Aegis: 8/25/99 & 9/1/99
Record: 8/27/99 & 9/3/99

HEARING DATE: October 11, 1999

* * * * *

ZONING HEARING EXAMINER'S DECISION

The Applicant, Bell Atlantic Mobile, is seeking a special exception pursuant to Code Section 267-53(l)(4) to allow a communications tower in an AG Agricultural District. The Applicant indicated that it will locate the tower on the subject property to comply with the Code requirement that the setback of the tower from all property lines shall be equal to the height of the tower plus ten (10) feet.

The subject parcel is located northwest of Bel Air, in the triangular area formed by MD Route 23 (East-West Highway) to the north, Morse Road to the south and east and MD Route 165 (Baldwin Mill Road) to the west, at 1714 Morse Road, Forest Hill, MD. It is more particularly identified on Tax Map No. 32, Grid 4D, Parcel 203. The property has frontage along both Route 23 and Morse Road, with access only from Morse Road. The property consists of approximately 35.40 acres, is presently zoned AG and is located entirely within the Fourth Election District.

The current owner and occupant of the parcel is the Jarrettsville Manor Memorial Post (VFW). Improvements to the property include a large brick and block meeting hall, paved parking areas, a sign facing Route 23, a cannon and flag staff next to the sign, and a tank. There are also a storage building and two storage shipping containers on the property. The balance of the property contains open land and areas of dense woodland. The proposed site for the tower is approximately 250 feet west of the VFW building, immediately adjacent to a heavily wooded area. The proposed tower itself would be approximately 200 feet high.

Case No. 4961 - Bell Atlantic Mobile

Several witnesses testified on behalf of the Applicant. Brian Stover, real estate and zoning manager for Bell Atlantic Mobile, testified regarding the criteria utilized for locating sites for communications towers and the suitability of the proposed site for this use. Mr. Stover's testimony can be summarized as follows: the proposed site will meet the setback requirement of the height of the tower plus 10 feet; the Applicant would construct a 200-foot tall monopole on a concrete base with 9 cellular antennas and one smaller antenna located on the pole; a 12 ft. by 30 ft. "equipment shelter" or building would be constructed next to the pole to house the necessary communications equipment, with both the shelter and pole being surrounded by an 8-foot chain link fence; and, the equipment would be remotely monitored with the exception of monthly maintenance checks. The witness further indicated that the height is necessary to provide a larger transmission area and reduce the need for additional tower locations. The site was chosen to address problems with calls in this service area, based upon requirements for service imposed by the Federal Communications Commission. While the Applicant did investigate the possibility of utilizing already existing structures or towers, no other appropriate sites were found in the vicinity that would meet the necessary criteria.

Lastly, the witness testified that the tower and associated equipment, as well as the proposed site, would meet all requirements of the Code, including the standards of Section 267-9(I), entitled Limitations, Guides and Standards. Specifically, the proposed structure would have no significant impact on adjoining properties, on traffic conditions, would generate no odor, dust, gas, smoke, fumes or noise, would require no governmental services, is consistent with generally accepted planning and engineering principles, would have no impact on any cultural or historical landmarks, and would have no adverse environmental impacts.

The Applicant produced an expert witness, a consulting engineer and expert in the field of radio waves, radio frequency and radiation, Mr. Jules Cohen. As Mr. Cohen pointed out, the operation of communications towers is regulated by the Federal Communications Commission (FCC) which requires the tower to meet specific radio frequency emission standards.

Case No. 4961 - Bell Atlantic Mobile

Applicant's expert testified that he conducted an analysis of the proposed facility and determined that the emissions from this location are not only in compliance with the FCC standards, they are at least 4500 times below the maximum permissible exposure for the general population. Accordingly, the Applicant's expert was of the opinion that there would be no adverse biological impact to humans or animals from this facility. Furthermore, the witness noted that federal law prohibits state or local government from regulating "the construction or modification of personal wireless service facilities on the grounds of environmental impact so long as the emissions from those facilities are consistent with the standards which have been adopted by the Federal Communications Commission."

The Department of Planning and Zoning recommended approval of the requested Special Exception, with the conditions that the Applicant submit a site plan for review through the Development Advisory Committee and that all necessary permits and inspections be obtained. Dennis Sigler appeared and testified for the Department, noting that the proposed tower was in compliance with the Master Plan and with the requirements of the FCC. The Department's findings, as outlined in the Staff Report, were that the location of this particular tower would have no significant impact on surrounding residential communities, on traffic, or the environment. In sum, "The Department of Planning and Zoning is of the opinion that the Applicant can meet the standards for the requested Special Exception."

One resident, whose property is located across Morse Road, appeared in opposition to the application on grounds that the tower would obstruct his view of the countryside and the sunsets. It was suggested, and agreed to by the Applicant, that the portion of the tower that extended above the tree line could be painted with a color that would help it blend in with the view. Also appearing in opposition to the application was Attorney Michael Worsham, hereafter "Protestant", whose standing was challenged by the Applicant. Mr. Worsham contends that he has standing due to the fact that he lives approximately two miles from the proposed site, that he will drive past the site on a regular basis, and that his health and safety will be affected by the radio frequency emissions from the tower. Mr. Worsham testified on his own behalf and conducted extensive cross-examination of Applicant's expert witness. Both the Applicant and Mr. Worsham submitted briefs on the issue of standing, as well as on the merits of the request.

Case No. 4961 - Bell Atlantic Mobile

With regard to the question of standing, the Harford County Charter, Section 709 provides:

“APPEALS TO CIRCUIT COURT. Any person aggrieved by any final decision in a zoning case shall have the right to appeal that decision to the Circuit Court for Harford County and shall have the further right of appeal to the Court of Appeals of Maryland. *The words “person aggrieved” shall be liberally construed to substantially broaden that class of persons and shall be interpreted to effectuate the general purposes of this article.*” (Emphasis added).

Section 704 of the Charter provides for widespread publication of notices of public zoning hearings. The Zoning Board of Appeals Rules of Procedure, Harford County Code, Sections A274-1 et. seq., includes numerous requirements for notice to the public regarding zoning hearings, including individual written notice to nearby property owners and posted notice on the subject property, in addition to the publication requirements set forth in the Charter. Notices are required to include a statement that “any person affected by the requested relief...” (Section A274-2B) has a right to attend the hearing and to request that subpoenas be issued on behalf of the affected person. These provisions, taken together with prevailing case law, suggest that significant latitude must be given with regard to testimony and evidence received at the administrative level in zoning matters to insure that citizen participation is encouraged and as much factual information as possible is brought to light. However, this latitude and informality is not without limits. The principles on which the concept of “standing” is based, namely, the need to limit the parties “...to those who are uniquely affected by the decision which is being appealed and precluding frivolous appeals, harassment, or merely crowding the courts with litigation...”, must be respected. (See Abrams, Stanley D., Guide to Maryland Zoning Decisions, Section 4.2.2, 3rd Edition, 1992, p. 151-152).

Accordingly, while a party must demonstrate that they have been “aggrieved” or injured by the decision of the administrative hearing examiner in order to pursue an appeal to the Board of Appeals or to the courts, it may be appropriate to allow that party “standing” to participate in the zoning hearing regardless of their ability to meet the more stringent requirements for standing under judicial review. In fact, as was the case here, it may be necessary for a Protestant to actively participate in the hearing in order to elicit testimony about whether or not the Protestant is or may be aggrieved.

Case No. 4961 - Bell Atlantic Mobile

In the case of Sugarloaf Citizens Ass'n v. Department of the Environment, 344 Md. 271, 686 A.2d 605 (1996), the facility at issue was a solid waste incinerator which produced airborne toxic substances. Due to the nature of the alleged harm, the court suggested that an aggrieved party could include people who live further from the proposed site than in a typical land use matter. The Sugarloaf decision established a clear distinction between standing at an administrative hearing and standing for purposes of judicial review.

" While an administrative agency or official may determine whether a person has administrative standing, it is erroneous for such agency or official to apply standards for judicial review to determine either standing before the agency or standing to maintain an action in court. Such a determination is exclusively a judicial function, and may not be determined by an administrative law judge."

Abrams, Section 4.2.2 (1999 Supp.), p. 60.

In the matter at hand, Protestant testified that he lived approximately two miles from the proposed site of the communications tower and that he opposed Applicant's request based upon alleged adverse impacts to his health as a result of exposure to radio frequency emissions from the tower. While Protestant failed to produce any credible evidence in support of his claim of adverse impact, he raised relevant issues and his participation supported a process that is designed to encourage citizen participation and public information. Therefore, without addressing the merits of Protestant's opposition to the Applicant's request and without a finding as to whether Protestant is in fact an "aggrieved" party for purposes of judicial review, the Examiner finds that Protestant meets the requirement for administrative standing in this matter.

Case No. 4961 - Bell Atlantic Mobile

CONCLUSION:

The Applicant is requesting a Special Exception to locate a communications tower and associated equipment in an Agricultural Zone pursuant to Sec. 267-53(l)(4) of the Harford County Code. The Section states:

“Towers, communications and broadcasting. These uses may be granted in the AG, B2 and B3 Districts, provided that the setback of the tower from all property lines shall be equal to the height of the tower plus ten (10) feet.”

There is no dispute that Applicant's request meets this requirement and no evidence to the contrary.

In addition, Section 267-9(l), “Limitations, Guides and Standards,” sets forth certain standards and guidelines which must be considered before a request for a special exception may be granted. Specifically, the application cannot be approved if the proposed use “would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood.”

In order to make such a determination, the following factors are to be considered:

“Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:

- (1) The number of persons living or working in the immediate area.
- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.
- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.

Case No. 4961 - Bell Atlantic Mobile

- (4) The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.
- (5) Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the county or persons to supply such services.
- (6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices.
- (7) The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.
- (8) The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.
- (9) The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.
- (10) The preservation of cultural and historic landmarks."

In the case of Schultz v. Pritts, 291 Md. 1 (1981), the Maryland Court of Appeals also set forth guidelines to be used in determining the validity of a special exception in a designated zoning district. Once a certain use has been enumerated by the legislative body, there is a presumption that the use is in the best interests of the general welfare and that the exception is valid "absent any facts or circumstances negating the presumption. The duties given to the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan." 291 Md. at 11-12, 432 A.2d at 1325.

The test for determining the existence of a sufficient "adverse effect" to justify a denial of the request is "whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." 291 Md. At 15, 432 A.2d at 1327.

Case No. 4961 - Bell Atlantic Mobile

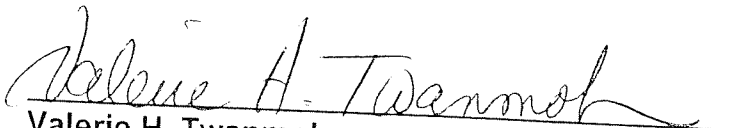
According to Schultz, the issue is not whether there are any adverse impacts associated with a communications tower. The fact that they are a use permitted only by special exception recognizes that communications towers have or may have adverse impacts no matter where they are located. The issue is whether those adverse impacts are greater at this location than they would be in any other location in an Agricultural District. (See Mossburg v. Montgomery County, 107 Md. 1, 666 A.2d 1253(1995))

Despite opposition to this application based upon claims of interference with the view of the countryside and potential adverse health impacts, there was no evidence presented at hearing to suggest that these impacts are any greater at this location than they would be in any other location in a rural area. The Applicant is willing to take steps to mitigate the impact on the view by painting the portion of the tower that rises above the tree line. While Protestant raised numerous and complex questions regarding alleged potential health effects, the evidence simply did not support a conclusion that such effects, even if proven, were greater at the proposed site than in any other location. No expert testimony or authoritative basis was presented at the hearing to support a conclusion that this tower and the emissions therefrom would be potentially hazardous to wildlife, to human health generally or to Protestant's health specifically. To the contrary, the evidence and testimony produced at trial demonstrates that the Applicant's request meets the standards and guidelines promulgated by Harford County, by the courts of the State of Maryland, and by the FCC.

For the reasons set forth herein, the Hearing Examiner recommends that the Applicant's request for special exception be granted subject to the following conditions:

1. That the Applicant submit the proposed site plan for review through the Development Advisory Committee.
2. That the Applicant obtain all necessary permits and inspections of the tower, equipment building and security fence.
3. That the Applicant paint the portion of the tower which rises above the tree line to minimize the impact on the view.

Date December 1, 1999


Valerie H. Twanmoh
Zoning Hearing Examiner